Does the objective of ICSID annulment jurisprudence invite an appellate mechanism?- A critical evaluation

Contributor's biography:

Sekander Zulker Nayeen is a PhD student at the City, University of London under auspices of the City Law School Doctoral Scholarship. He is also an Additional District and Sessions Judge to the Bangladesh Judiciary, and the UK Government's Chevening Scholar. He teaches Law at the City, University of London and the University of Hertfordshire. Zulker Nayeen completed LLM in Civil Litigation and Dispute Resolution with Distinction from the City, University of London. He studied LLB (Hons) and LLM (First Class) in the University of Rajshahi. He can be reached at zulkerlaw@yahoo.com; zulkerbjsc@gmail.com**;** Md.Zulker-Nayeen@city.ac.uk. His ORCID iD is https://orcid.org/0000-0001-5242-8728.

Acknowledgment:

This manuscript is a modified version of a chapter of his LLM dissertation that was submitted to the City, University of London. The author acknowledges the cordial assistance of his supervisor Professor David Collins in accomplishing this research.

Does the objective of ICSID annulment jurisprudence invite an appellate mechanism?- A critical evaluation

Abstract

The ICSID annulment history suggests that upholding the arbitral award's finality is the main objective of annulment jurisprudence and the reasons for adopting such finality were the Convention-drafters' desires for expeditious and economic resolution of the dispute. However, in recent years, the belief concerning the consumption of more time and costs within appellate system has undergone change, and consequently, a demand for the appellate mechanism in ICSID has gained momentum.

I. Introduction

Under article 52 of the ICSID Convention, an *ad hoc* Committee[1] is empowered either to annul any arbitral award or reject the annulment application. This mechanism is considered as the most significant,[2] exceptional,[3] drastic and a limited remedy[4] because in this mechanism the parties do not have any other alternative but to arbitrate the same issues further by a newly formed ICSID tribunal.[5] Such nature of remedy does not allow the *ad hoc* Committee to review the substantive correctness of the tribunal's award. Nevertheless, some *ad hoc* Committees have delivered their decisions by adopting a more expansive substantive review than their permissible periphery of review authority.[6] As a result, there arose some demands of adopting an appellate mechanism in ICSID system. This has created confusion regarding the objective of the ICSID annulment mechanism.[7] Should the *ad hoc* Committees follow limited review mechanism to uphold the objective of finality? Or should the Committees adopt substantial review mechanism with a view to finding the correctness of the awards? If the objective of finality does not serve the desired purpose, what reformations in the ICSID review regime could work better? In such backdrop, Part- II of this article describes a brief overview of the ICSID annulment mechanism. Part- III endeavors to

---

[1] *Ad hoc* Committee may be addressed as 'annulment committee' too.

[2] Lucy Reed, Jan Paulsson, et al., *Guide to ICSID Arbitration*, (2nd edn, Kluwer Law International 2010) 162

[3] ICSID Secretariat, 'ICSID 1986 Annual Report: Introduction of the Secretary General Ibrahim F.I. Shihata' 4

[4] Herbert Smith, 'ICSID Annulment Awards: The Fourth Generation' (February 2011) <www.lexology.com/library/detail.aspx?g=7218cb56-7a64-426f-8cc0-8475303444e6> accessed 09 August 2016

[5] Reed and Paulsson, n 2, 162

[6] Dohyun Kim, 'The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need To Move Away From Annulment-Based System' (2011) 86 New York University Law Review 242.

[7] Ibid

determine a concrete objective of the ICSID annulment by analyzing its history. Part- IV compares the question of time and costs efficacy in an annulment mechanism with those of an appellate system. Part- V discusses the existing demands for an appeal facility in the ICSID review system. Lastly, Part- VI puts forward a prospective framework of an appellate mechanism for ICSID.

II. Brief overview of the ICSID annulment mechanism

ICSID annulment is a review regime against the awards rendered by an ICSID tribunal. In other arbitral systems, such review regime is called 'setting aside', 'annulment' or '*vacatur*'[8] where the courts or superior tribunal possess the powers to set aside, modify, remit or declare an award as having no effect in whole or in part. In the ICSID system, the word 'annulment' denotes erasing an arbitral award as if it was never rendered.[9] If the parties desire to arbitrate the dispute again, it must be submitted to a newly constituted tribunal[10] which will follow the same proceedings as it followed in the original arbitration.[11] In case of partial annulment, the newly formed tribunal shall not reexamine any part of the award not so annulled.[12] However, an application for annulment may be submitted by either party to the proceedings on one or more of the grounds specified in article 52(1) of ICSID Convention. The grounds are: (a) improper constitution of tribunal; (b) manifest excess of powers; (c) corruption on the part of a member of the tribunal; (d) serious departure from a fundamental rule of procedure; (e) failure to state reasons on which award is based.[13] In practice, a request for annulment typically invokes a number of aspects each of which allegedly should lead to the annulment of award.[14]

The Secretary-General of ICSID will register an application[15] and the Chairman will constitute an *ad hoc* Committee of three persons to hear the review of the award.[16] During this appointment, the Chairman will select the members only from a 'panel of arbitrators'.[17] This 'panel of

---

[8] Kateryna Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32 (6) Journal of International Arbitration, Kluwer Law International 621, 628

[9] David Collins, ICSID Annulment Committee Appointments: Too Much Discretions for the Chairman (2013) 30 (4) Journal of International Arbitration 333, 335

[10] ICSID Convention art 52(6)

[11] ICSID Arbitration Rules, rule 55(2)(d)

[12] ICSID Arbitration Rules, rule 55(3)

[13] ICSID Convention art 52(1)

[14] Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 The Law and Practice of International Courts and Tribunals 211, 213

[15] ICSID Arbitration Rules, rule 52

[16] ICSID Convention art 52(3)

[17] ICSID Convention art 52(3)

arbitrators'[18] is a special list of arbitrators consisting of persons designated by the Contracting States[19] and the Chairman.[20] Each Contracting State may designate up to four persons and the Chairman may designate up to ten persons to this panel.[21] However, if any panel member had a prior connection with any of the parties through nationality or designation to the panel or working as arbitrator or conciliator in favor or against any of them, that member will be regarded disqualified for the Committee concerned.[22]

The *ad hoc* Committee is allowed to exercise a limited form of authority. It only has the power to annul the award or any part thereof on any of the grounds specified in the ICSID Convention.[23] Like an appellate court, it cannot modify or remit any award rather it erases the existence of an award. The annulment process does not give the *ad hoc* Committees the power to revise an award on the merits or to reopen the tribunal's decision on the evidence.[24]

III. Objective of ICSID annulment jurisprudence: a detour to the history of annulment

Throughout the history of ICSID annulment, the decisions of different Committees elaborated and explained the objective of the annulment procedure. On the basis of consistency in the decisions, Schreuer classified the history of ICSID annulment into three generations.[25] The first generation contains the first two annulment cases known as *Klöckner I*[26] and *Amco I*[27]. The second generation consists of the decisions in *MINE*[28], *Klöckner II*[29]and *Amco II*[30]. The third generation is

---

[18] ICSID Convention art 3

[19] ICSID Convention art 13(1)

[20] ICSID Convention art 13(2)

[21] ICSID Convention art 13

[22] ICSID Convention art 52(3)

[23] ICSID Convention art 52(3)

24 Claire Stockford, Appeal Versus Annulment: Is the ICSID Annulment Process Working or Is It Now Time For An Appellate Mechanism? in Ian A Laird, Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris Publishing 2012) 311

[25] Christoph Schreuer, 'Three Generations of ICSID Annulment Proceedings' 17-19 < www.univie.ac.at/intlaw/wordpress/pdf/69.pdf> accessed 10 August 2016.

[26] *Klöckner I v Republic of Cameroon* (ICSID Case No. ARB/81/02) Decision on Annulment 3 May 1985

[27] *Amco I Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/01) Decision on Annulment 16 May 1986.

[28] *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (ICSID Case No. ARB/84/4) Decision of partial Annulment 22 December 1989

[29] *Klöckner II v Republic of Cameroon* (ICSID Case No. ARB/81/02) Decision on application for Annulment 17 May 1990

[30] *Amco II Asia Corporation v Republic of Indonesia* (ICSID Case No. ARB/81/01) Decision on application for Annulment 17 December 1992

based on two decisions of the annulment Committee in *Wena*[31] and *Vivendi I*[32] cases. This classification has also been endorsed by some other commentators.[33] Of them, Stockford[34] extended the third generation to 2000 onwards whereas Marchili[35] termed the same period as fourth generation. The two first generation decisions have received severe criticism by the commentators because of reviewing the merits of the two cases and inappropriately going beyond the line of difference between annulment and appeal.[36] Concerns raised in this first generation of cases were addressed by the second generation of decisions.[37] The third generation cases are considered to reinforce the distinction between appeal and annulment setting out parameters of the extent of powers of an annulment Committee.[38]

Some Committees, e.g. *Klöckner II*[39]*,CMS*[40]*, Vivendi II*[41]*,* observed that the annulment is neither an appeal nor any like remedy.[42] This has also been observed in the case of *Patrick Mitchell* stating, '….that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award'.[43] Therefore, the decisions of *ad hoc* Committees established that it is in no way an appellate body, nor authorized to carry out a substantive review into the matters with a view to checking correctness of tribunal's decision.

---

[31] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision on application for Annulment 5 February 2002.

[32] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (Vivendi I) v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on application for Annulment, 3 July 2002

[33] Silvia M Marchili, ICSID Annulment: A Saga of Virtue and Vice 283 and Claire Stockford, Appeal Versus Annulment: Is the ICSID Annulment Process Working or Is It Now Time For An Appellate Mechanism? 307 in Ian A Laird, Todd J. Weiler, n 24.

[34] Stockford, n 24, 319-28

[35] Marchili, n 24, 289-300: *Mitchell, Malaysian Historical Salvors, CMS, Sempra, Enron* cases constitute fourth generation according to this commentator.

[36] George R Delaume, 'The Finality of Arbitration Involving States: Recent Developments' 5 Arbitration International 21, 32 (1989); Mark B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards, 2 ICSID Review-Foreign Investment Law Journal 85 (1987) cited in Schreuer, Three Generation, n 25, 18.

[37] Schreuer, Three Generation, n 25, 18

[38] Stockford, n 24, 320

[39] *Klöckner II*, n 29, para 5.07

[40] *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8) Decision on the Application of Annulment 25 September 2007 para 43

[41] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.(Vivendi II) v Argentine Republic* (ICSID Case No. ARB/97/3) Decision on the Application for Annulment 10 August 2010 para 247(i)

[42] Schreuer, n 14, 212

[43] *Patrick Mitchell v Democratic Republic of the Congo* (ICSID Case No. ARB/99/7) Decision on the Application for Annulment 1 November 2006 para 19.

Subsequently, some other Committees commented that the Committee does not have the jurisdiction to review the merits of the original award,[44] consider the substance of the dispute,[45] and substitute its own analysis of law and fact with that of the arbitral tribunal.[46] So, what does the ICSID annulment allow?

In any review regime, usually, two aspects undergo scrutiny, one is the procedural legitimacy and the other is the substantive correctness on merit. ICSID annulment only allows the first one. As commented in *CDC* case,

> '[A]rticle 52(1) looks not to the merits of the underlying dispute as such, but rather is concerned with the fundamental integrity of the tribunal, whether basic procedural guarantees were largely observed, whether the Tribunal exceeded the bounds of the parties' consent, and whether the Tribunal's reasoning is both coherent and displayed. …. annulment is concerned with the legitimacy of the process of decision, rather than with the 'substantive correctness of the decision'[47]

The *MCI* Committee concurred with this decision stating, 'the role of an *ad hoc* Committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness'.[48] These decisions pointed out that the Committee is entrusted with enquiring only into the fundamental integrity of the tribunal. In doing so, it will examine whether the tribunal observed three duties during its decision-making process, namely, compliance to the basic procedural guarantees, non-encroachment of parties' agreement and presenting a coherent reasoning throughout the award. If the tribunal follows these three duties, its decision will not be subjected to annulment no matter how incorrect the award might be. That is why a later Committee concluded that '[an] *ad hoc* Committee will not annul an award if the Tribunal's disposition is tenable, even if the Committee considers that

[44] *Togo Electricité and GDF-Suez Energie Services v Republic of Togo* (ICSID Case No. ARB/06/7) Decision on Annulment 6 September 2011 para 50.

[45] *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) Decision on the Application for Annulment 30 July 2010 para 63; see also *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9) Decision on the Application for Annulment 16 September 2011 para 81.

[46] *Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru* (ICSID Case No. ARB/03/28) Decision on the Application for Annulment 1 March 2011 para 144

[47] *CDC Group plc v Republic of the Seychelles* (ICSID Case No. ARB/02/14) Decision on the Application for Annulment 29 June 2005 para 34.

[48] *MCI Power Group, LC and New Turbine, Inc v Republic of Ecuador* (ICSID Case No. ARB/03/6) Decision on Annulment 19 October 2009 para 24.

it is incorrect as a matter of law'.[49] Thus, the ultimate objective of annulment is to scrutinize the tribunal's procedural integrity in delivering the award not to check its correctness.

The annulment system looks into only the procedural legitimacy because of the finality character of ICSID arbitral award. The *MINE* Committee depicted this finality character of ICSID awards stating '…the Convention excludes any attack on the award in national courts. The award is final in that sense. It is also final in the sense that even within the framework of the Convention it is not subject to review on the merits.'[50] It further stated that,

> '[T]he hoc Committee retains, a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.'[51]

Therefore, the main objective of ICSID annulment jurisprudence is to uphold the finality. For having it established, they drew a clear line of difference between appeal and annulment commenting that establishing correctness will invite introduction of appellate review which eventually would vitiate finality, i.e., the ultimate objective of ICSID arbitration. Under the principle of finality, every award is presumed to be valid and final.

However, what has been achieved by establishing the principle of finality? The achievement is, 'once a final arbitral award is rendered, the dispute and related costs issues are resolved, with no possibility of appeal'.[52] Once there is no appeal, the dispute is relieved of undergoing substantial review by any authority, and consuming more money and time. That is how, as Schreuer said, finality is designed to serve the purpose of efficiency in terms of an expeditious and economical settlement of disputes.[53] Thus, providing a 'timely', 'expeditious' and 'economical' settlement of

---

[49] *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision of Annulment 14 June 2010 para 55

[50] *MINE*, n 28, para 4.02

[51] *MINE,* n 28,4.10

[52] Stockford, n 24, 340-341

[53] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 903

disputes is the main reason for adopting the principle of finality in ICSID annulment system.[54] Considering the likely consumption of more time and cost in reaching the final decision, even the drafters of the ICSID Convention did not intend ICSID annulment to operate like an appeal.[55] However, let's see how does the ICSID save time and costs?

IV. Time and costs efficiency in annulment and appellate mechanism

A. Time and costs in ICSID annulment mechanism

Diel-Gligor commented that though the parties prefer ICSID arbitration with view to achieving time efficiency, it is vulnerable to delaying tactics.[56] For a short review on the time consumption in the ICSID annulment proceedings, its timeframe needs to be discussed.

An application for annulment must be submitted within 120 days after the date on which the award was rendered.[57] Upon receipt of such application, the Chairman will constitute the *ad hoc* Committee to hear the annulment.[58] The Convention and Arbitration Rules only provide that the Chairman 'forthwith' must constitute the *ad hoc* Committee for disposing the application for annulment.[59] There is no timeframe for the submission of memorial, counter-memorial, hearing the submission and delivering the decision which renders the proceedings to be continued for an indefinite period. Moreover, if the effect of annulling an award is considered, it appears more time consuming and thereby costly as every award bears interest with it. In a survey it has been found that, the average annulment proceeding took 26 months from registration to decision.[60] The effect of an ICSID annulment is a drastic one because it invalidates the award or part of it as if there were no arbitration. Reed and Paulsson commented that unlike an appeal court, an *ad hoc* Committee may not issue a decision substituting its views on any aspect of the case for those of the original tribunal.[61] The effect of annulment leaves the parties with the only option to arbitrate the same matter again following the proceedings of original arbitration by a newly constituted tribunal.[62] By

---

[54] ibid

[55] Bondar , n 8, 624

[56] Katharina Diel-Gligor, Systemic Deficiencies of ICSID Investment Arbitration? An Inspection of the Annulment Mechanism in Rüdiger Wolfrum, Ina Gätzschmann (eds) International Dispute Settlement: Room for Innovations? (Springer 2012) 359, 364

[57] ICSID Convention, art 52 (2)

[58] ICSID Convention, art 52(3)

[59] ICSID Convention, art 52(3); See also Arbitration Rules, r 52(1)

[60] Adam Raviv, 'A Few Steps to a Faster ICSID' 8(5) *Global Arbitration Review* 23, 16 www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/GAR-8-5-ICSID accessed 18 August 2016.

[61] Reed et al., n 2, 162

[62] ICSID Convention art 52(6)

collecting some data from ICSID website,[63] on those cases which have been resolved finally through resubmission and re-annulment (three cases), it reveals that six cases have been decided by the resubmission tribunal and one tribunal's proceedings has been suspended on the agreement of the parties. However, it has been discovered that for final disposal of those disputes the minimum time was six years and the maximum was 18 years. The average period of resolving these cases was 12 years. The time, particularly for annulment, has also been found unreasonable ranging from a minimum 14 months to a maximum 41 months. Even after the decision of the resubmitted tribunal, three cases underwent to a second annulment proceedings. So, what would be the fate of the dispute if the award was annulled for the second time? Would it be the constitution of the third tribunal? This phenomenon puts the ICSID arbitration in an unending cycle making the principle of finality more relative.

The table below shows the time consumed for resubmitted disputes concluded to date.

Cases	Date of registration	Date of award	Annulment registration	Annulment decision	Resubmission	Resubmission decision	Total years
Sempra	6 December 2002	28 September 2007	30 January 2008	29 June 2010	12 Nov 2010	3 April 2015 Discontinued	12 years
Enron	11 April 2001	22 May 2007	7 March 2008	30 July 2010	18 October 2010	15 October 2016 Proceeding suspended	15 years
Victor	20 April 1998	8 May 2008	6 July 2009	18 December 2012	8 July 2013	17 March 20-16 Closed. Decision pending	18 years
Vivendi	19 Feb 1997	21 Nov 2000	23 March 2001	3 July 2002	24 Oct 3003	20 August 2007	13 years
			19 Dec 2007	10 August 2010			

[63] ICSID Cases, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx accessed 5 April 2020.

MINE	18 Sept 1984	6 January 1988	30 March 1988	22 December 1989	26 January 1990	20 Nov 1990 Discontinued	6 years
Klöckner	14 April 1981	21 Oct 1983	16 Feb 1984	3 May 1985	3 July 1985	26 January 1988	9 years
			1 July 1988	17 May 1990			
Amco	27 Feb 1981	20 Nov 1984	27 March 1985	16 May 1986	20 October 1987	5 June 1990	11 years
			18 Oct 1990	17 December 1992			

The cost of resolving a dispute is related to the timeframe. Every prolongation in ICSID arbitration proceedings results in incurring more costs by the parties. So, the principle of finality under ICSID annulment proceedings cannot be claimed to be time and costs effective.

A. Time and costs in an appellate system

The analysis hereunder shows that the introduction of appellate mechanism in any institutional arbitration may reduce time and costs in two ways: firstly, resolving the dispute finally without requiring any further arbitration; secondly, maintaining strict timeframe in appellate proceedings.

Firstly, in contrast to the annulment, the appellate system seems to be more advantageous in ensuring finality because, generally, the appellate court possesses the powers to set aside, remit or vary any award which helps resolve the dispute finally with correctness. In this system, the court has a greater chance of eliminating error[64] in the award substituting its own findings or varying the awards or simply setting aside the application for appeal. Like the annulment system, it does not only declare an award void, in whole or in part, rather, it remits the case to the original tribunal giving the opportunity to resume arbitral proceedings to eliminate defects, i.e., to eliminate the grounds for setting aside.[65] For example, English law authorizes a court to set aside or remit or vary the award in the case of any serious irregularity amounting to a substantial injustice to any party.[66] In the United States, the court may direct a rehearing of a case by arbitration, if the award is

[64] Lord Justice Dyson, 'Finality in Arbitration and Adjudication: The Eversheds Lecture 2000' (2000) 66(4) Arbitration 288, 288.

[65] Bondar, n 8, 631.

[66] UK Arbitration Act (UKAA 1996), ss 67, 68.

vacated.[67] Such powers of appellate authority resolve any dispute finally without requiring any further submission to the newly constituted tribunal and rushing to a second or more annulment proceedings.

Secondly, the prevailing concerns over the delay by an appellate mechanism do not seem to be material because it could be dealt with a strict timeframe within the appellate process.[68] Some arbitration authorities successfully established the appellate system to be completed within the shortest possible time imposing a strict timeframe such as the WTO's dispute settlement system. This dispute settlement system is considered an effective[69] and authoritative judicial institution in world politics.[70] It provides a right to appeal before the WTO Appellate Body (AB) established by Dispute Settlement Body (DSB).[71] This AB possesses the authority to uphold, modify or reverse the panel's findings and decisions.[72] The proceedings of this AB generally require to be completed within 60 days starting from the date of formal notice of appeal to that of circulation of final report.[73] If the AB fails to conclude the proceedings within this stipulated period, it, after recording the reason for such delay, can extend the time of disposal to maximum 90 days.[74] The appellant on the same day of a notice of appeal must file the written submission and serve a copy on the other parties to the dispute and third parties.[75] Any party who wishes to reply to the appeal must file written submission within 18 days of the notice of appeal.[76] For any third party this time limit is 21 days.[77] If any other party wishes to join as appellant, they must file written submission within five days of the notice of appeal.[78] A division of the AB will conduct the oral hearing between 30 to 45 days after the date of the filing of a notice of appeal.[79] The appellate report will be circulated within the aforementioned 60 to 90 days. Gleason supposes that keeping the arbitral process to such a

---

[67] United States Federal Arbitration Act, s 10.

[68] Stockford, n 24, 343

[69] Carole Murray, David Holloway and Daren Timson-Hunt, *Schmitthoff: The Law and Practice of International Trade* (12th edn, Sweet & Maxwell 2012) 975

[70] Gregory Shaffer, Manfred Elsig, Sergio Puig 'The Extensive (But Fragile) Authority of the WTO Appellate Body' (2016) 79(1) Law & Contemporary Problems 237, 238.

[71] WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) art 17.1 & 17.4

[72] Understanding the WTO: Settling Disputes- A Unique Contribution www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm accessed 11 December 2019.

[73] DSU, n 71, art 17.5

[74] Ibid

[75] WTO Working Procedure for Appellate Review (WPAR), r 21(1)

[76] Ibid, r 22(1)

[77] Ibid, r 24 (1)

[78] Ibid r 23 (1)

[79] Ibid, r 27(1)

relatively short span of time protects parties from consuming costs and time in the proceedings demonstrating that the appeal processes need not invite undue delays to the dispute resolution process; costs for parties or an unmanageable caseload for the institution. [80] From the above example, it can reasonably be conceived that an appeal mechanism does not consume an inordinate amount of time and money if it is framed within a strict schedule of proceedings.

However, there are some criticisms against such timeframe of WTO AB, as, in recent years, it has been proved that both 60-day and 90-day timeframes are insufficient and untenable to complete the proceedings effectively.[81] As a result, the AB frequently fails to complete the proceedings within the stipulated times. Nevertheless, adoption of a strict timeframe could be supportive, if we look into two aspects. First, the AB maintained the 90-day timeframe in most of the cases till 1999.[82] But now it cannot maintain the timeframe because, over the years, the number of appeal-filing has increased significantly.[83] For deciding all these appeals there are only seven permanent AB members.[84] Ehlermann gives an account as to why this small number of AB members cannot complete the proceedings in time.

> 'The Appellate Body's workload is particularly intense in situations where several appeals in different disputes are filed simultaneously or within a short period of time. When three or more appeals are pending at the same time, several of the seven AB members will be sitting in more than one appeal, so that there can be no overlap in the scheduling of hearings and internal meetings for those appeals. A separate problem is the extent to which it is possible for an AB member to be engaged simultaneously in deliberations, analyze voluminous submissions and documents from the panel record, and prepare and revise drafts for multiple appeals with parallel time schedules.'

The situation would be different if the ICSID review regime adopts appellate system with a strict timeframe. In ICSID system, the arbitrators will never be overburdened with the increase of appeal-filing because there are hundreds of qualified arbitrators in the 'panel of arbitrators'. At present,

[80] Erin E Gleason, 'International Arbitral Appeals: What Are We So Afraid Of?' (2007) 7(2) Pepperdine Dispute Resolution Law Journal 269, 274

[81] Claus-Dieter Ehlermann, 'The Workload of the WTO Appellate Body: Problems and Remedies' (2017) 20(3) Journal of International Economic Law 705, 710

[82] Ibid 707

[83] Ibid 708

[84] DSU, n 71, art 17.1

there are 154 Contracting States[85] to the ICSID and each of these States may designate four persons to the 'panel of arbitrators'. In addition, the Chairman may designate ten members to the panel. Such a long panel would allow the Chairman to constitute as many *ad hoc* Committees as necessary. Unlike the AB members, one single arbitrator of an *ad hoc* Committee would not be in need of involving in several appeals at the same time. Therefore, like the AB, the ICSID would not struggle to complete the appeal proceeding within stipulated time. Second, the existence of a strict timeframe has a psychological value which in turn contributes to save unnecessary consumption of time in any proceeding. Ehlermann comments, '....the time limit has an enormous disciplinary effect on the participants, as well as on Appellate Body Members and the Secretariat, and allows for an efficient and effective resolution of disputes.[86] Given the situations, there should be a strict timeframe to complete the appeal proceedings.

VI. Demands for appeal facility in the ICSID mechanism

Some investment practitioners and academics argue in favor of adopting an appellate review in ICSID arbitral mechanism.[87] Even some Committees[88] felt the temptation for an appellate review, though they were cautious about their authority. ICSID itself admits there is increasing demand of appellate mechanism in investment arbitration in its discussion paper.

The ICSID Discussion Paper[89] on the 'Possible Improvements of the Framework for ICSID Arbitration' dated 22 October 2004, should, briefly, be discussed here. The annexure to this Discussion Paper started with a proposal to adopt a set of ICSID Appeals Facility Rules by the Administrative Council. Since the amendment of the ICSID Convention requires unanimous ratification of the Contracting States, it proposed adoption of Appeals Facility Rules so that the parties to any treaty may freely opt either to undergo an appeal facility or remain aloof from it.[90]

---

[85] Database of ICSID Member States, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx accessed 8 April 2020.

[86] Ehlermann, n 81, 719

[87] Asif H Qureshi, An Appellate System in International Investment Arbitration? in Peter Muchlinski, Fedrico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1155, 1156

[88] eg, *CMS,* n 40*; Patrick Michell,* n 43*, Vivendi I,* n 32

[89] ICSID Secretariat, 'Possible Improvements of the Framework For ICSID Arbitration' Discussion Paper, 22 October 2004 para 20, https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration accessed 22 August 2016.

[90] 'Possible Features of an ICSID Appeals Facility' paras 2-4, annexed to the Discussion Paper on 'Possible Improvements of the Framework For ICSID Arbitration', n 89

Like the WTO AB, there would be an Appeals Panel composed of 15 persons elected by the Administrative Council.[91] A three members' Appellate Tribunal (AT) for a particular appeal could be constituted from the panel by the Secretary-General after consultation with the parties as far as possible.[92] The AT could be, in addition to the specified grounds in article 52 of ICSID Convention, authorized to hear appeals on the grounds of clear error of law and serious error of facts[93] and it might annul, uphold, modify or reverse the award drawing the finality of it.[94] In case of such an annulment or modification or reversal of any award, either party could submit the case to a new arbitral tribunal under the same rules as the first arbitral tribunal.[95] Following the WTO timeframe, for speedy disposal of the dispute, there would be specific time limits for the appeal proceedings from the date of registering the request.[96]

The proposal discussed above considerably imitated the WTO appellate mechanism. The proposal, though seemingly useful, was abandoned by most of the Contracting States commenting that it would be premature to attempt to establish such an ICSID mechanism at this stage.[97] Although, about sixteen years ago, ICSID members discarded the proposal of adopting an appeal facility, it still has some efficacies. Sacerdoti and Recanati commented, 'the issue is still of interest, on the one hand, because of the reference to an appellate mechanism made recently in several investment agreements and, on the other hand, because of the uncertainty stemming from the inconsistent case law of ICSID Annulment Committees.[98] So, now the time has come to rethink the matter.

VII. A prospective framework of appeal in ICSID mechanism

Marchili while discussing the possibility of this appellate mechanism and its consequences posed some questions.[99] Whether there would be an appellate court or an appellate body with different panels? What would be the scope of review of the appellate court? Would it still be able to

---

[91] Ibid, para 5

[92] Ibid, para 6

[93] Ibid, para 7

[94] Ibid, para 9

[95] Ibid

[96] Ibid, para 11-12

[97] ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat, 12 May 2005, para 4 <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations> accessed 22 August 2016.

[98] Giorgio Sacerdoti, Matilde Recanati, From Annulment to Appeal in Investor-State Arbitration: Is the WTO Apeal Mechanism a Model? in Jorge A. Huerta-Goldman, Antoine Romanetti, et al. (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration, Global Trade Law Series, Volume 43* (Kluwer Law International 2013) 327, 331

[99] Marchili, n 24, 304

annul the decision or only revert it? Who would select the members of appellate panel? How the investors would be represented in the panel? To sum up, the concerns are related to two matters, first, the composition of the panel and constitution of the appellate tribunal; second, the extent of the tribunal's review power.

First, although the proposal imitated WTO AB mechanism, there was a significant difference in the composition of the panel of arbitrators for this appellate body. WTO AB is a permanent body of seven persons[100] whereas ICSID appellate panel was proposed to be composed of 15 members out of which three *ad hoc* members would constitute the AT being appointed by the Secretary-General. Some commentators namely Sacerdoti and Recanati expressed doubt that entrusting the appeal with *ad hoc* adjudicators would not ensure the consistency of the standards of review applied on appeal nor ensure uniformity of interpretation.[101] This doubt can be overcome by preparing the panel of arbitrators with qualified, efficient and experienced arbitrators. There may be a separate panel of arbitrators for appeal who would be selected out of the designees forwarded by the Contracting States and the Chairman of ICSID. During this designation, both the States and the Chairman should designate qualified persons to the panel responsibly and following some specified criteria. The Administrative Council of ICSID or a Committee under it, upon proper scrutiny, would nominate those arbitrators for the appeal panel. This procedure would satisfy the commentators' concerns as to the composition of the panel of arbitrators for appeal because such a separate panel of arbitrators would contribute to the development of consistent investment jurisprudence. One concern still left to be satisfied is the question of investors' representation on the panel. Since the investors are entitled to be a party of ICSID arbitration because they are the nationals of Contracting States,[102] any designation by the Contracting States should be deemed their representation. In addition, during the composition of any Appellate Tribunal (AT), there may be a system of 'party consultation'[103] or 'party preference' whereby parties including the investors would be entitled to forward their arbitrators from the panel of arbitrators for appeal. Under the 'party-preference' system, the parties may send a confidential letter of preference mentioning three names from the appeal panel to the Chairman who may appoint anyone out of them. It is mention-

---

[100] DSU, n 71, art 17.1

[101] Sacerdoti and Recanati, n 98, 352

[102] ICSID Convention, art 25(1) & (2)

[103] There are some example of consulting with the parties in appointing members of *ad hoc* Committee, for example, in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v the Republic of Peru,* ICSID Case No. ARB/03/4, Decision on Annulment 5 September 2007 para 24, it is mentioned that 'after consultation with the parties, ICSID appointed Sir Franklin Berman, Justice Hans Danelius and Professor Andrea Giardina to serve on the Ad hoc Committee set up for the annulment proceedings'.

worthy that ICSID has implemented a practice of preference voting for selecting arbitrators for its original arbitration when it is asked for. Under this system, the Secretariat gives the parties a ballot naming three potential arbitrators and asking simply 'yes' or 'no' to the names proposed.[104] A reverse practice may evolve for selecting a member of the AT wherein the parties will give three names from the panel and ask the Chairman to appoint anyone of them. This 'party consultation' and 'party preference' seems a reasonable way of ensuring investors' representation to the AT.

Second, the proposed ICSID Appeals Facility provided that appeal can be sought on three sets of grounds- (i) the existing grounds specified in article 52; (ii) clear error of law and (iii) serious error of facts. However, the present ICSID grounds of annulment represent only the procedural legitimacy of the award. Adding the grounds relating to the error of law as well as facts would widen the scope of review. It has been observed that WTO Appellate Body is entitled to review the question of law and legal interpretation of the panel only.[105] Some other countries like the USA, China, and New Zealand provide a review on law excluding the fact.[106] Likewise, English law specifies some serious irregularities amounting to substantial injustice as the grounds of the challenge against an arbitral award.[107] It even made an appeal on law optional providing the parties an opportunity to exclude any prospective appeal on points of law.[108] Under this law, the general approach of the court would be supportive to arbitration and the court would only interfere for rectifying the glaring and indefensible irregularities.[109] Following the instances of WTO and these national legislations, the review on the question of fact could be trimmed out and a narrow approach to reviewing on law, legal interpretation and procedural irregularities could be adopted as grounds of appeal. For further development of ICSID jurisprudence, the decisions of the AT could have legal effect, i.e., development through precedent. At present, though the arbitral awards do not have any binding precedent, those have some persuasive values.[110] There is also an unofficial recognition of precedent in ICSID system. For instance, Mr. Ziadé, a Deputy Secretary-General of ICSID, states that they extend secretarial supports with a view to raising arbitrators' awareness on the existing

---

[104] Meg Kinnear, The Future of ICSID in T.J. Weiler and I.A. Laird (eds), *Investment Treaty Arbitration and International Law* Vol 5 (Juris Publishing 2012) 1, 7.

[105] DSU, n 71, art 17:6

[106] Gary B Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2014) 3341-3351

[107] UKAA 1996, s 68

[108] UKAA 1996, s 69

[109] Bruce Harris, Rowan Planterose and Jonathan Tecks (eds), *The Arbitration Act 1996: A Commentary* (5th edn, John Wiley & Sons Ltd 2014) Para 68C.

[110] Ian Laird, Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System?' (Fall 2005) 7(2) The Journal of Appellate Practice and Process 285, 299.

case laws.[111] Raising the arbitrators' awareness on the case laws strengthens their persuasive values and thereby proves an existence of soft precedent in the ICSID system. If a formal precedent system is established, it will ensure consistency and predictability of investment law[112] and accuracy and uniformity of interpretation of treaties.[113] As regard the extent of powers, the proposed Appeals Facility Rules providing the power to set aside, modify or reverse the award is acceptable. The proposal regarding remission to the original tribunal appears unjustified because it may increase the complexity requiring reconstitution of the tribunal. So, the power to set aside, modify and reverse the award will ensure both finality and correctness of ICSID AT's award because it resolves the dispute completely without requiring the parties for pursuing resubmission. In exercising these powers, the AT may adopt a supportive attitude to the award rendered by the tribunal. In interpreting any legal issue, the AT may follow precedent for a predictable and consistent development of ICSID jurisprudence.

[111] Nassib Ziadé, 'Achieving Efficiency in Arbitration: The Role of the Institutions' (2008) 25(1) News From ICSID 5

[112] Karl-Heinz Bockstiegel, 'Commercial and Investment Arbitration: How Different Are They Today? The Lalive Lecture 23 May 2012' 28(4) Arbitration International 587

[113] Yilei Zhou, 'Breaking the ice in the international commercial arbitration: from the finality of arbitral award to the arbitral appeal mechanism' (2014) 3 China-EU Law Journal 289, 296